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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR ELMER WHELCHEL, JR., Defendant and Appellant.	G041534 (Super. Ct. No. 08CF0085) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

Arthur Whelchel, Jr., appeals from his conviction for multiple sex offenses committed against his minor daughter and her stepsister. He contends: (1) the trial court erred by excluding evidence of one of the victim's sexual history; (2) his victims' statements to adults disclosing occurrence of the offenses were not admissible as "fresh complaint" evidence; (3) various pattern jury instructions undermined the presumption of innocence and lessened the prosecution's burden of proof; and (4) an error in the sentencing minute order must be corrected. Although we agree the minute order requires correction, Whelchel's other contentions are without merit, and we affirm the judgment.

FACTS

The two minor victims in this case are Whelchel's daughter, F.W., and her stepsister, N.Y. F.W.'s mother, Glenda Y., was married to Whelchel from 1990 to 1994. After their divorce, Glenda moved to Northern California with F.W. and her brother, but F.W., divided her time between her parents. Glenda subsequently married N.Y.'s father and N.Y. lived with them.

In 2003, F.W. then age 12, went to live with Whelchel in Orange County for about a year. She moved back to her mother's home until 2007, when she returned to Orange County to live with Whelchel. F.W. and Glenda spoke almost every day and Glenda thought everything seemed fine.

In January 2008, F.W. went back to Glenda's in Northern California. On the day of her arrival, Glenda and N.Y. picked up F.W. at the airport. Glenda immediately became suspicious because F.W.'s luggage did not have airline tags and she was acting strangely.

A few days later, on January 8, 2008, Glenda confronted F.W. after finding an airline ticket in her bag dated three weeks earlier than the day Glenda had picked her up at the airport. F.W. immediately became upset and said something had happened and she had recently been staying at "various places," and not at Whelchel's. During those three weeks Glenda had on occasion called Whelchel's house to talk to F.W., but each

time she called, Whelchel told her F.W. was at work or asleep. He never told Glenda that F.W. was no longer staying with him. As Glenda started to telephone Whelchel to find out what was going on, F.W. started screaming, "Don't call my dad. He's been molesting me. He raped me." Fifteen-year-old N.Y. then came into the room screaming, "He did that to me too." On cross-examination, Glenda corrected herself and testified that after accusing Whelchel of molestation, F.W. telephoned her boyfriend, H.S., and handed the phone to Glenda, and it was H.S. who said F.W. had been raped.

Glenda immediately called the police and said her daughters reported being raped and molested by Whelchel. She then called Whelchel and confronted him with the girls' accusations. Whelchel said he was sorry. Glenda told Whelchel he should kill himself, and he said he would. Whelchel later called and left a message on Glenda's answering machine, saying he had taken pills and alcohol, and would kill himself.

When the police arrived at Glenda's house, they set up a pretext telephone call with Whelchel that was tape recorded. The tape was played for the jury. In the telephone conversation, Glenda assured Whelchel she loved him and they would "work this out." Whelchel was driving at the time, and seemed confused and disoriented. Glenda told him he sounded funny, and Whelchel said he had taken approximately 80 Advil PM pills and had nothing to live for. Whelchel said he loved F.W. and did not mean to hurt her. Glenda told Whelchel she wanted him to step up to the plate and tell F.W. he would never hurt her again. Whelchel replied, "It still aint gonna go away." When Glenda said the girls would think it was their fault he molested them, Whelchel told her to tell them it was not their fault. When Glenda cautioned Whelchel to not do anything stupid, he replied, "I already did stupid."

F.W. then got on the phone with her father. Whelchel told her that he had taken a bottle of pills and would "make it all go away." F.W. begged Whelchel to go to a hospital and asked if he was sorry for what he did. Whelchel said he was very sorry. F.W. and Whelchel said they loved each other, and F.W. asked Whelchel why he did it.

He said he did not know, and said he did not remember anything. When F.W. said, "You know you did it to [N.Y.], right?" he said, "Not like that."

Later that evening, Whelchel was involved in a head-on collision on Interstate 5. A California Highway Patrol officer who had been at the accident scene testified Whelchel seemed disoriented and confused. Whelchel said he was in pain and going to his home up north. The officer then heard a broadcast to look for Whelchel as a possible suicidal party who had consumed alcohol and pills. The officer later spoke to Whelchel at the hospital, but he was unresponsive to further questions. Whelchel said he had not understood what his family was saying to him when he talked to them on the phone.

F.W. testified at trial and described living with Whelchel in 2003. It was early summer, and her two brothers and a sister were visiting. All of them were in the living room watching a movie, and F.W. fell asleep on the couch. Her siblings fell asleep as well, and when she woke up, F.W. said she became aware Whelchel was putting his hands down her pajama pants, and touching her in her genital area. She said similar incidents happened "various times" in 2003.

F.W. testified another incident happened later in the summer of 2003. She was folding and putting away laundry. Whelchel was sleeping on her bed, when he reached out and pulled her onto the bed, and "started doing it again. He hugged her, and she hugged him back, but then he began to touch her in the same way as the first time.

F.W. testified that on another occasion in 2003, Whelchel locked the door after her brother went outside to play. Whelchel then sat on the couch and pulled F.W. onto his lap and began rubbing against her. Whelchel stopped when F.W.'s brother knocked on the door to come back in. On another occasion, she said Whelchel rubbed her breasts when she was sleeping on the floor. She was having a sleepover with her siblings, and Whelchel touched her while the others were sleeping.

F.W. testified Whelchel began dating Megan Hoffman in October or November 2003 at which time he stopped touching her. After she finished sixth grade, F.W. moved back to her mother's house. She never told anyone about the incidents. She continued to have a good relationship with her father and occasionally visited him in Orange County.

In June 2007, F.W. returned to live with Whelchel and Hoffman because she was not getting along with her mother. In October, Whelchel and Hoffman broke up, and Hoffman moved out of the apartment. On October 19, F.W.'s boyfriend, H.S., who lived in Northern California, came to visit for a few days.

F.W. testified Whelchel began molesting her a few weeks after Hoffman moved out. The first incident occurred as F.W. slept on the couch in the living room. Whelchel inserted his fingers slightly inside F.W.'s vagina, and touched her chest over her clothing. On another occasion, F.W. was again sleeping on the couch, and she woke up to find Whelchel touching her under her clothing. He again inserted his fingers inside her vagina, and touched her breasts, this time slipping his hand under her bra. The next incident was again on the couch, and in addition to touching her as before, F.W. testified Whelchel took her hand and placed it around his penis. She testified similar incidents happened "maybe 13 times total" between October to early December. She also described one act of oral copulation.

F.W. testified that on two occasions in 2007 Whelchel had intercourse with her; once in November and once in December. The November incident occurred when Whelchel came home after drinking. Afterwards he apologized and took her shopping for clothes to make amends. F.W. later called H.S. but did not talk about the incident. The December incident similarly occurred when Whelchel came home one night after drinking. After that incident, F.W. called H.S. and told him what happened. Although F.W. and H.S. had talked about the possibility of her returning to Northern California to visit him, they made concrete plans after the December 2 incident. F.W. conceded her

father had bought the ticket and said she could go see H.S. for Christmas vacation, "as long as you don't tell your mom because she'll get mad."

H.S. testified he was 17 years old and F.W. was 15 years old when they started dating in the fall of 2007. After F.W. moved to Orange County, they spoke on the phone and "texted" each other regularly, and were "deeply in love." When H.S. came to Orange County to visit F.W. in October, he did not observe anything inappropriate.

On December 2, F.W. called H.S. and said she had been raped by her father. F.W. said she had fallen asleep on Whelchel's bed, and when he returned home from drinking, he raped her. F.W. and H.S. had made plans for F.W. to come and stay with him during Christmas and New Year's. Glenda did not know about the planned visit, but Whelchel did. H.S. told F.W. to calm down and said they would straighten everything out when she came to visit. H.S. told F.W. she would have to tell her mother eventually, but they did not talk about the alleged rape again. H.S. confirmed F.W. had told him she would do anything to be with him. By mid-December 2007, F.W. was 16 years old and H.S. had turned 18 years old. On the day F.W. told Glenda about the molestation, Glenda called H.S. and asked him if everything F.W. said was true. He told Glenda it was.

F.W.'s stepsister, N.Y, testified about her own molestation by Whelchel in 2007 when she was 15 years old. N.Y. and F.W. were close in age and very close friends. In June 2007, N.Y. came to visit F.W. for two weeks. While there, N.Y. slept upstairs on the couch and F.W. slept downstairs in her own bed.

About two days after N.Y. arrived, she fell asleep while the family watched a movie. N.Y. woke up later. Everyone else had gone to bed, but Whelchel was holding her hand. N.Y. pulled her hand back and went to bed. Each night Whelchel would go a little further when N.Y. fell asleep on the couch. He started by rubbing her arm, and she would pull away and he would stop. By the third or fourth incident, Whelchel moved his

hand to N.Y.'s chest, and eventually slipped it under her bra. She looked at him and he stopped. According to N.Y, the first night Whelchel touched her under her bra, he also touched her inside her pants. The next evening he went further and reached under N.Y.'s underwear. He continued doing "the same stuff" each night. N.Y. did not remember Whelchel inserting his fingers inside her vagina, but he rubbed her outside her genital area. N.Y. said that on one occasion, near the end of her visit, Whelchel orally copulated her.

After her visit, N.Y. told Glenda she had a great time. She did not tell anyone what happened until the day in January that she heard F.W. and Glenda fighting. She went to see what was going on, and Glenda came running out of the room. N.Y. went into the room with her sister, locked the door, and told F.W. that Whelchel had molested her.

Defense

Whelchel's ex-girlfriend, Hoffman, testified that during the years she lived with Whelchel she never observed Whelchel abuse his children, and F.W. never indicated she had been abused. Whelchel's second wife, the mother of his younger children, testified Whelchel was an "excellent father" and she had never seen any sign her own children or Whelchel's older children had ever been abused by him.

Whelchel's employer testified he often saw F.W. and never heard of any complaints that Whelchel molested her. He talked to Whelchel on the telephone during Whelchel's January 8, 2008, drive to Northern California. Whelchel's speech was slurred, he could not say exactly where he was, and was unable to answer questions correctly.

Whelchel testified on his own behalf and denied sexually abusing either F.W. or N.Y. In the fall of 2007, Whelchel became aware F.W. was dating H.S. Whelchel agreed to let H.S. come and visit for approximately a week, and thought he seemed like a "nice kid." After that visit, the relationship between F.W. and H.S. heated

up, they were constantly talking on the phone, Internet, or text-messaging, and Whelchel at one point had a phone bill of $1,300. When F.W. moved back in with Whelchel in 2007, she agreed she would finish high school in Orange County, and there would be no more bouncing back and forth between her parents. F.W. kept asking Whelchel if she could go visit H.S. over the Christmas break, and he relented when she threatened to run away if he did not let her go. Whelchel had no idea why N.Y. would fabricate allegations against him.

When Glenda called Whelchel on January 8 and told him about F.W. and N.Y.'s allegations, he responded that it was "bull shit." When Glenda told him he should kill himself, he hung up on her. Later, he lost control. He felt that because of the allegations, he would lose his family and his job, and so he did attempt to take his own life. He consumed an entire bottle of Advil PM, but did not drink any alcohol. The last thing he remembered is getting in his car and being on the driveway. He woke up later in the hospital. Whelchel had no recollection of talking to Glenda or his daughter after he took the pills.

Whelchel was charged with 16 sex offenses against the two minor victims, F.W. and N.Y. After two counts were dismissed, the jury convicted him on the remaining 14 counts as follows: lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a))[1] (counts 1 & 2); oral copulation of a minor (§ 288a, subd. (b)) (count 3); sexual penetration by a foreign object of a minor under 18 and older than l3 (§ 289, subd. (h)) (counts 4, 6, 8, and 10); unlawful sexual intercourse with a minor more than three years younger (§ 261.5, subd. (c)) (count 7); forcible rape (§ 261, subd. (a)) (count 9); lewd act on a child of age 14 who was at least 10 years younger than the defendant (§ 288, subd. (c)) (counts 11, l3, and 15); sexual penetration by a foreign object of a minor younger

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

than 16 and older than l3 (§ 289, subd. (i)) (count 12); and oral copulation of a minor under the age of 18 (§ 288a, subd. (b)) (count 14). Whelchel was sentenced to a total term of 21 years and 4 months in prison.

DISCUSSION

1. Evidence of F.W.'s Sexual History

Whelchel contends the trial court erred by prohibiting him from questioning F.W. about whether she was involved in a sexual relationship with her boyfriend, H.S. Whelchel asserts such evidence could have challenged F.W.'s credibility, supplying a motivation for her fabricating the allegations against him. We find no error.

"A defendant generally cannot question a sexual assault victim about his or her prior sexual activity." (*People v. Bautista* (2008) 163 Cal.App.4th 762, 781 (*Bautista*).) An exception exists when evidence of the complaining witness's prior sexual history is "offered to attack the credibility of the complaining witness as provided in [Evidence Code section] 782." (Evid. Code, § 1103, subd. (c)(5).) "Evidence Code section 782 provides for a strict procedure that includes a hearing outside of the presence of the jury prior to the admission of evidence of the complaining witness's sexual conduct. [Citations.] Evidence Code section 782 is designed to protect victims of molestation from 'embarrassing personal disclosures' unless the defense is able to show in advance that the victim's sexual conduct is relevant to the victim's credibility. [Citation.] If, after review, 'the court finds the evidence relevant and not inadmissible pursuant to Evidence Code section 352, it may make an order stating what evidence may be introduced and the nature of the questions permitted.'" (*Bautista, supra,* 163 Cal.App.4th at p. 782.) "By narrowly exercising the discretion conferred upon the trial court in this screening process, California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to

limit public exposure of the victim's prior sexual history." (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708 (*Chandler*).) Stated another way, the credibility exception to the inadmissibility of a complaining witness's prior sexual conduct should not "impermissibly encroach upon the rule itself and become a 'back door' for admitting otherwise inadmissible evidence." (*People v. Rioz* (1984) 161 Cal.App.3d 905, 919.)

Before trial began, the court conducted the requisite hearing concerning admissibility of evidence of F.W.'s sexual history. Defense counsel made the following offer of proof. Counsel suspected F.W. was involved in a sexual relationship with H.S. and it was Glenda's disapproval of that relationship that caused F.W. to be sent to Orange County to live with Whelchel in the early fall of 2007. When Glenda found out F.W. had spent the past three weeks with H.S., and had resumed sexual relations with him, Glenda was upset and wanted F.W. to go to the doctor. F.W. did not want to. Defense counsel speculated F.W. might have been concerned H.S. could get in legal trouble, and charged with statutory rape, if their sexual relationship was disclosed. Accordingly, counsel believed F.W. falsely accused her father of molestation to divert attention from H.S. Accusing Whelchel would also prevent F.W. from having to return to Orange County, allowing her to remain in Northern California near H.S. There was no evidence Glenda had ever threatened to call the police on them. In ruling evidence of F.W.'s sexual history inadmissible, the court observed Glenda already knew about F.W.'s sexual relationship with H.S. And the defense theory that F.W. fabricated the allegations so she could stay near H.S. could be shown by inquiring into their dating relationship without inquiring as to their sexual relationship.

We review the trial court's ruling in denying the admission of a sex crime victim's prior sexual conduct for an abuse of discretion. (*Chandler, supra,* 56 Cal.App.4th at p. 711.) We will not disturb a court's exercise of its discretion "*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently

absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Whelchel has not demonstrated an abuse of discretion. The defense theory was that F.W. falsely accused her father of molesting her to divert attention from H.S. and to ensure she could remain in Northern California with him. But that theory did not require evidence F.W. and H.S. were actually involved in a sexual relationship as opposed to their being romantically involved. There was no dispute they were dating, considered themselves to be "deeply in love," and F.W. wanted to be with H.S. Furthermore, Glenda was apparently aware F.W. and H.S. were involved in a sexual relationship and there was no evidence she or anyone ever threatened to report H.S. to the police. Thus, evidence of an actual sexual relationship between F.W. and H.S. was of limited probative value on F.W.'s credibility, and in view of the purpose of Evidence Code section 782 to protect victims of molestation from embarrassing personal disclosures, it was properly excluded.

We also reject Whelchel's assertion exclusion of evidence of F.W.'s sexual history violated his constitutional rights. "'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]'" (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Given the limited probative value of the proposed evidence and the potential for prejudice to the victim, the exclusion of the evidence did not rise to the level of a constitutional violation.

2. Fresh Complaint

Whelchel contends testimony from Glenda and H.S. concerning statements made to them by F.W. and N.Y. about the molestations were inadmissible hearsay and did not satisfy the requirements of the fresh complaint doctrine. He further contends the court erred by not giving a limiting instruction on the permissible use of the evidence. We find no error.

Before trial the prosecution filed a motion to allow it to introduce testimony from Glenda and H.S. regarding statements made to them by F.W. and N.Y., including F.W.'s statement to H.S. in December 2007 that "her father raped her[,]" her similar disclosure to Glenda a few weeks later, and N.Y.'s subsequent statement a few minutes later that she had been "molested" by Whelchel in the summer of 2007. Defense counsel acknowledged F.W.'s statements about having been molested were admissible, but specific details about the offenses were not. Accordingly, he objected to using the specific word "raped" in testimony about the statements. The trial court ruled the statements admissible under the fresh complaint doctrine.

On direct examination by the prosecution, Glenda testified that in January 2008, when she indicated she was going to call Whelchel to find out where F.W. had been for the past three weeks, "[F.W.] started screaming and crying and said, 'Don't call my dad. He's been molesting me. He raped me." N.Y., who had been in the hallway, then "came screaming down the hall, yelling, 'He did that to me too.'" On cross-examination by the defense, Glenda clarified F.W. only used the word "molesting." It was in Glenda's subsequent telephone conversation with H.S. that H.S. told Glenda "about the rape portion of it, that [F.W.] could not verbally get that out." Glenda also testified she called the police and reported her daughters had reported Whelchel had molested one and raped the other.

H.S. testified that on December 2, 2007, F.W. called him around midnight. She was "really reluctant, [and] had been crying." She told H.S. "she had been raped" by her father. F.W. told H.S. she had fallen asleep on Whelchel's bed. Whelchel returned home intoxicated and raped her

Whelchel argues the victims' statements related by Glenda and H.S. exceeded the scope of a fresh complaint and their admission violated the hearsay rule. He asserts some of the statements were too remote in time and some were too detailed. We examine the court's ruling for abuse of discretion (*People v. Waidla* (2000)

22 Cal.4th 690, 717-718), and reverse only if any error in admitting evidence resulted in prejudice. (*People v. Marks* (2003) 31 Cal.4th 197, 226-227; *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999.)

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay evidence is inadmissible unless there exists an exception to the rule that permits its admission. (*Id.*, subd. (b).)

Under the "fresh-complaint doctrine" the trial court may admit evidence of a complaint made by a victim of a sexual offense. (*People v. Brown* (1994) 8 Cal.4th 746, 749-750 (*Brown*).) As our Supreme Court explained in *Brown*: "[P]roof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose-namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred. Under . . . generally applicable evidentiary rules, the timing of a complaint (e.g., whether it was made promptly after the incident or, rather, at a later date) and the circumstances under which it was made (e.g., whether it was volunteered spontaneously or, instead, was made only in response to the inquiry of another person) are not necessarily determinative of the admissibility of evidence of the complaint. Thus, the 'freshness' of a complaint, and the 'volunteered' nature of the complaint, should not be viewed as essential prerequisites to the admissibility of such evidence." (*Ibid.*)

Brown also placed limits on the type of testimony that may be admitted under the fresh-complaint doctrine: "[E]vidence of the victim's report or disclosure of the alleged offense should be limited to the fact of the making of the complaint and other circumstances material to this limited purpose." (*Brown, supra,* 8 Cal.4th at p. 763.) The fact of the making of the complaint includes "evidence demonstrating that the complaint

"'*related to the matter being inquired into, and* [*was*] *not a complaint wholly foreign to the subject . . . .*"' [Citation.]" (*Id.* at p. 756, citing *People v. Burton* (1961) 55 Cal.2d 328, 351 (*Burton*).) This limitation is required to "eliminat[e] or at least minimiz[e] the risk that the jury will rely upon the evidence for an impermissible hearsay purpose"—that is, "as tending to prove the truth of the underlying [sexual offense] charge." (*Brown, supra,* 8 Cal.4th at pp. 762-763.)

In *Burton, supra,* 55 Cal.2d at pages 351 to 352, the court observed, "the alleged victim's statement of the nature of the offense and the identity of the asserted offender, without details, is proper. (E.g., *People v. Adams* (1928) 92 Cal.App. 6, 16 ['that appellant had "ruined her"']; *People v. Porter* (1920) 48 Cal.App. 237, 241-242; *People v. Lopez* (1917) 33 Cal.App. 530, 534 ['that she had had sexual intercourse with her father']; [citation].)" In *Burton,* the victim's testimony that the victim's stepfather "'made me play with his peter'" was permissible as a statement of the fact of molestation. (*Burton, supra,* 55 Cal.2d at pp. 337, 351; see also *People v. Butler* (1967) 249 Cal.App.2d 799, 804 ["'the man was sucking his thing'"]; *People v. Cordray* (1963) 221 Cal.App.2d 589, 594 ["'he had pulled her pants down and he had kissed her between the legs'"].)

In view of the foregoing, we cannot say the trial court abused its discretion by admitting Glenda's and H.S.'s testimony about the victims' statements. (*People v. Alvarez* (1996) 14 Cal.4th 155, 203 [abuse of discretion standard applicable].) The statements were not too remote. F.W.'s statement was made to H.S. after the second alleged rape. Her statements to her mother were made as soon as she was confronted by her mother about her behavior. N.Y.'s statement was prompted by F.W.'s disclosure. Nor can we say the statements were overly specific. F.W. stated her father had "raped" her; N.Y. said he had "molested" her. Both were permissible as statements of the fact of molestation and the detail in the statements did not exceed what has been found

acceptable in other cases. The admission of the statements was not an abuse of discretion.

Whelchel complains the statements lacked sufficient indicia of reliability. He asserts F.W. and H.S. had a motivation to lie because they wanted to deflect attention from their own relationship. And N.Y.'s accusation was obviously one made "in solidarity with her close friend and stepsister" and thus similarly unreliable. We nonetheless cannot say the court abused its discretion in allowing the statements into evidence. The victims' alleged motivation to fabricate was fully explored.

Whelchel complains the statements contained multiple layers of hearsay. Specifically, he argues assuming F.W.'s statements to Glenda and H.S. were admissible under the fresh complaint doctrine, Glenda's testimony about H.S. having told her what F.W. said was not. But even assuming this was impermissible multiple hearsay, given that H.S. testified in court about what F.W. told him, we fail to see how Whelchel was prejudiced by Glenda's testimony.

Whelchel also complains the court erred by not giving a limiting instruction that the evidence of F.W.'s and N.Y.'s statements was admissible only for a nonhearsay purpose, and the trial court erred in giving CALCRIM No. 318 without modification to reflect the limited purpose of the statements.[2] As the court in *Brown* stated, a trial court has no duty, absent a request, to provide such a limiting instruction. (*Brown, supra,* 8 Cal.4th at p. 757.) Whelchel made no request for a limiting instruction in this case and therefore he cannot now complain about the trial court's failure to provide one.

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[2] The trial court instructed the jury with CALCRIM No. 303 (limited purpose of evidence), which provided, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." It also instructed with CALCRIM No. 318 (prior statement as evidence), which provided, "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: [¶] 1. To evaluate whether a witness's testimony in court is believable; AND [¶] 2. As evidence that the information in those earlier statements is true."

While conceding his counsel failed to request either a limiting instruction or modifications to the standard instructions, waiving the issue on appeal, Whelchel argues failure to make such requests constituted ineffective assistance of counsel. When a claim of ineffective assistance of counsel is raised on appeal, rather than by way of a petition for writ of habeas corpus, and no explanation for counsel's claimed failures appears, we must reject the claim unless defendant can establish there was no reasonable tactical or strategic explanation for counsel's actions or inactions. (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) We simply cannot say there was no reasonable explanation for counsel's failure to request the limiting instruction. Furthermore, even if the jury improperly relied on the hearsay statements for their truth, in view of the detailed testimony of both victims, we cannot say a more favorable result would have occurred had the jury been given a limiting instruction.

3. Other CALCRIM Instructions: Burden of Proof; Presumption of Innocence

Whelchel raises familiar attacks on the pattern jury instructions concerning reasonable doubt, types of evidence, and weighing conflicting evidence. He argues CALCRIM Nos. 220, 222, 223, and 302, individually and taken together undermine the presumption of innocence and improperly shift the burden of proof to the defendant thus violating his constitutional rights.[3] None of his arguments have merit.

a. CALCRIM Nos. 220 and 222

Whelchel contends CALCRIM Nos. 220 and 222 have the effect of advising the jury it could not consider the lack of evidence in determining whether a reasonable doubt existed. We disagree.

CALCRIM No. 220 instructs as follows: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not

[3] The Attorney General argues Whelchel waived his arguments because he did not object to the instructions below. We have discretion to consider the arguments nonetheless (§ 1259), and do so to stave off the inevitable ineffective assistance of counsel claim. (*People v. Osband* (1996) 13 Cal.4th 622, 693.)

be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

CALCRIM No. 222 instructs in relevant part: "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom . . . the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence."

Whelchel contends CALCRIM No. 220's direction to the jury that it "impartially compare and consider all the evidence[,]" individually and in combination with CALCRIM No. 222's directive that, "You must use only the evidence that was presented in this courtroom[,]" improperly suggests to the jury reasonable doubt may only arise from evidence, and not from a lack of evidence. He argues the wording of the two instructions combines to suggest evidence presented by the defense will not undermine that presented by the prosecution unless "it weighed at least as much as the evidence presented by the prosecution." And he contends that by telling jurors to "impartially compare and consider" the evidence, CALCRIM No. 220 suggests a "mere civil standard of impartiality" thus lessening the prosecution's burden of proof.

Whelchel's contentions have been rejected by several appellate courts. (See, e.g., *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1117-1118; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268-1269; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510 (*Westbrooks*); *People v. Rios* (2007) 151 Cal.App.4th 1154, 1156-1157.) We agree with the analyses in those opinions. The trial court did not err by giving these instructions.

Viewing the instructions as a whole, a reasonable juror would not believe the "impartially compare and consider all the evidence" phrase in CALCRIM No. 220 lessens the prosecution's burden to prove its case beyond a reasonable doubt or alters the presumption of innocence concept. The instructions plainly and clearly state a defendant in a criminal case is presumed to be innocent and that this presumption requires the People prove each element of a crime beyond a reasonable doubt. The instruction then tells the jurors that in deciding whether the People have met this burden, they "must impartially compare and consider all the evidence" received throughout the entire trial and unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and they must find him not guilty.

As explained in *Westbrooks*, *supra*, 151 Cal.App.4th at page 1509, the "impartially compare and consider" phrase "merely instructs the jury that it must consider only the evidence presented at trial in determining whether the People have met their burden of proof. In other words, this instruction informs the jury the People may not meet their burden of proof based on evidence other than that offered at trial." Nothing in the instruction suggests that a jury must find in the prosecution's favor if the defendant does not produce any evidence, nor is there anything in the instruction that suggests the concepts of "compare" and "consider" mean the jury is not bound to presume a defendant's innocence or that the jury should not apply the beyond a reasonable doubt standard of proof.

b. CALCRIM Nos. 223 and 302

Whelchel contends the trial court erred by instructing jurors with CALCRIM Nos. 223 and 302, which together "undermined the presumption of innocence and improperly shifted the burden of proof to him," and thereby deprived him of due process. We disagree.

CALCRIM No. 223 advised the jury: "Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. Circumstantial evidence also may be called indirect evidence. *Circumstantial evidence* does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside. [¶] Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all of the evidence."

CALCRIM No. 302 advised the jury as follows: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

Whelchel contends CALCRIM No. 223's language stating the purpose of evidence is to "prove or disprove the elements of a charge," suggests the defense must do more than merely raise a reasonable doubt to merit an acquittal, and that the defense must disprove an element of the charged offense. He also complains about CALCRIM No. 302's language telling jurors that in resolving a conflict in the evidence, they "must decide what evidence, if any, to believe." He argues because the instruction does not distinguish between inculpatory and exculpatory evidence, the instruction undermines the presumption of innocence and imposes on him the burden of pointing to exculpatory evidence to raise a reasonable doubt.

Whelchel's contentions have been rejected by the courts in *People v. Ibarra* (2007) 156 Cal.App.4th 1174 (*Ibarra*); *People v. Anderson* (2007) 152 Cal.App.4th 919 (*Anderson*); and *People v. Reyes* (2007) 151 Cal.App.4th 1491. We adopt the reasoning of those opinions.

CALCRIM No. 223 defining direct and circumstantial evidence neither refers to the burden of proof nor states a defendant must affirmatively disprove an element of the offense to obtain an acquittal. "Reasonably read, [CALCRIM No. 223] cautions only that neither direct nor circumstantial evidence should be accorded greater weight simply because it is direct or circumstantial evidence." (*Anderson, supra,* 152 Cal.App.4th at p. 930; see also *Ibarra, supra,* 156 Cal.App.4th at p. 1186.)

Whelchel's attack on CALCRIM No. 302's telling jurors that in resolving a conflict in the evidence, they "must decide what evidence, if any, to believe" is similarly unavailing. Reading CALCRIM No. 302 reasonably, and in context, nothing in the instruction undermines the presumption of innocence or obligates a defendant to present exculpatory evidence. CALCRIM No. 302 "does not tell the jury to disregard the prosecution's burden of proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by the prosecution than by the defense." (*Ibarra, supra,* 156 Cal.App.4th at p. 1191.) It simply "mandates that the jury

'decide what evidence, *if any*, to believe,' regardless of which side introduces the evidence." (*Ibid*.)

4. Sentencing Minutes

Whelchel contends, and the Attorney General agrees, the minute order from the January 23, 2009, sentencing must be corrected. The minute order incorrectly states Whelchel pled guilty to the charges when he was in fact convicted by a jury. Clerical errors may be corrected by this court on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, we order the minute order corrected.

DISPOSITION

We order the minute order of January 23, 2010, be corrected to eliminate all references to guilty pleas by defendant and to instead reflect that defendant was found guilty by a jury of the offenses. As corrected, the judgment is affirmed.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.